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Zoning By-laws: Human Rights and *Charter* Considerations Respecting the Regulation of the Use of Land

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Zoning By-laws: Human Rights and *Charter* Considerations Respecting the Regulation of the Use of Land

Since the Supreme Court of Canada decision in *Bell* v. *Her Majesty the Queen*[1] in 1979, municipalities across Canada have grappled with the issue of regulating the use of land, and not the user. The decision in *Bell* is often cited for the principle that a municipality cannot "people zone". While no one disputes this premise, difficulty arises in situations where the use of land by particular groups and/or for short durations causes, or is perceived to cause, external impacts signifying incompatible land uses that zoning is meant to avoid. These concerns often arise as a result of the shared use of dwellings by students in and around college and university campuses, a concentration of social service uses, or short term rental accommodations in resort communities. Case law across Canada has been inconsistent, making it difficult for municipalities to effectively draft, or enforce, their by-laws. The courts have also made it clear that Human Rights Codes and the *Charter of Rights and Freedoms* ("*Charter*") must be considered by a municipality when enacting zoning by-laws that may impact particular groups of persons.

A review of the applicable case law across Canada demonstrates that these issues are far from clear. What is clear, however, is that zoning by-laws impacting particular groups of persons will continue to be scrutinized by tribunals and the courts. In enacting such zoning by-laws, municipalities will need to ensure that its by-laws are passed for a proper planning purpose, that there is sufficient information and material to evaluate the reasonableness of the regulation in light of Human Rights Codes, as well as to justify any potential infringement of rights pursuant to s. 1 of the *Charter*.[2]

The Discriminatory Nature of Zoning

Any discussion of human rights and *Charter* considerations in zoning needs to begin from the perspective that zoning by-laws are by their very nature discriminatory. Establishing a particular land use zone creates a distinction – those uses that will be permitted within the zone and those that will be prohibited. Such distinctions will have varying impacts on land owners, and particular user groups.

In considering the appropriateness of a zoning by-law distinction, the overriding consideration should be its purpose. The purpose of the zoning power is to prevent nuisance and the physical interference with land by ensuring that adjacent land uses are compatible. Therefore, when evaluating zoning by-law provisions, the first step should be to consider the purpose of the provisions and whether there is a legitimate land use planning purposes. While this may seem a basic principle, such an analysis has not always been considered by the courts.

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[1] [1979] 2 S.C.R. 212.

[2] Section 1 of the *Charter* provides that: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

User v. Use Principle established by *Bell*

Charter and human rights considerations now usually go hand in hand with a discussion of the Supreme Court of Canada decision in *Bell*. In *Bell*, the plaintiff lived with two individuals who were not related to him by blood, marriage or adoption. The applicable zoning by-law restricted occupancy of a dwelling unit to a "family", defined by reference to consanguinity, marriage and adoption. In striking down the by-law, the Supreme Court of Canada held that the "legislature never intended to give authority to make such rules and the device of zoning by reference to the relationship of occupants rather than the use of the building is one which is *ultra vires* of the municipality under the *Planning Act*."

In support of its decision, the Supreme Court of Canada noted the prohibitive effect of the by-law in precluding the sharing of accommodation by two adult persons unrelated by blood or marriage, mentioning college students as one of the endless examples. What the court did not do, is assess the purpose of restricting the allowable use of a dwelling unit. In this way, while no one argues with the basic premise against zoning the users of land rather than its use, the decision in *Bell* has not been very helpful in providing guidance for future analysis. Many cases that have followed simply refer to the "user vs. use" distinction on the face of the by-law without further elaboration. However, municipalities can discourage or encourage certain uses without reference to "users". For example, by unit size, number of rooms per unit, minimum lot size and frontage, etc. Merely looking at the words of the zoning by-law may not be sufficient, without considering the purpose of the zoning regulation.

A good example is zoning for retirement residences or retirement communities. Applying *Bell* on its face, any zoning by-law provision restricting the use of land to those of a particular age, would be considered zoning the "user". However, there may be proper planning reasons for such a distinction, including varying needs for parks and schools.

Application of *Bell*

Following the *Bell* decision, the Ontario Superior Court heard the case of *Smith* v. *Township of Tiny*[3], which again considered the validity of a zoning by-law that contained a definition of "family". In this case, the definition of family was broader, and included persons living together but not related. As a result of the broader language used, the court found that the result would not be unreasonable or inequitable, and the by-law was therefore upheld.

In British Columbia, the British Columbia Court of Appeal considered the *Bell* decision in the case of *Faminow v. North Vancouver (District)*[4]. A by-law governing the use of single-family residential buildings had been quashed by the trial judge following the line of reasoning in *Bell*. On appeal, the court found that the trial judge incorrectly relied on the wording of *Bell* in which Justice Spence said "and so was not regulating the use of the building but who used it". The judge went on to find that *Smith* had application to the case in question and given that the wording of the by-law was broader than *Smith*, the by-law was found to be neither unreasonable or inequitable and the appeal was allowed.

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[3] 1980 CarwellOnt 489, 12 M.P.L.R. 141; aff'd 29 O.R. (2d) 661; leave to appeal refused 29 O.R. (2d) 661n.
[4] 1988 CarswellBC 78, 24 B.C.L.R. (2d) 49.

In the 2006 British Columbia Court of Appeal case of *Greater Victoria School District No. 61 v. Oak Bay (District)*[5], a school was closed, and in a desire to keep with the residential nature of the neighbourhood, a by-law zoned the land for "civic use" which was defined under the by-law as "under the auspices of a government body". The applicant asserted that the by-law was discriminatory, as it drew a distinction between users (as opposed to uses) such that only those operating under government auspices could use the property for purposes that were otherwise permitted. As a result, private individuals, religious groups and charities would not be able to conduct uses that were otherwise authorized as they are not within the auspices of a government body. The court held that the distinction between public and non-public use of land amounted to a distinction based on "user" rather use and the by-law was held to be *ultra vires*.

In Ontario, the decision in *Bell* has been considered several times by the Ontario Municipal Board, which hears appeals of zoning by-laws and other planning instruments across Ontario. For example, in *Haydon Youth Services v. Kearney (Town),*[6] the Board considered a by-law governing a facility that functions as a group home for young people with behavioural problems and youth offenders. The plaintiff sought to open a facility in the Town of Kearney, a small town of predominantly senior citizens. Once the citizens of the Town heard of this venture, they lobbied Council and the by-law defining a group home was changed to exclude young offenders and the number of permitted residents was decreased from 10 to 4. On appeal, the Board held that the actions taken by Council were reasonable given the size and nature of the community and the level of services that the community had available. In considering the issue of "people zoning", the Board reiterated that zoning is by its nature discriminatory as to uses and intensity of uses. The Board stated: "I would prefer to reduce the effort of arguing over "people" zoning and get back to the simple and fundamental principles of planning for people. Clearly, as planning is for people then certain basic services must be available to serve the needs of those people, however you define them."

In vacation destinations across Canada, the issue of tourist accommodations has led to further evaluation of the concept of people zoning and the user vs. use distinction. A zoning by-law's definition of "family" was considered in the Alberta case of *Canmore Property Management Inc v. Canmore (Town).*[7] This case concerned the regulation of "Tourist Home" in a popular tourist resort town. Again the Alberta Court of Queen's Bench applied the *Bell* decision, but found that in accordance with *Smith*, the definition was sufficiently broad and that the by-law was regulating the use of land, not the users of the land. The court considered the definition to be a bona fide attempt to regulate the use of the premises and not to limit the users by outlining a class of occupation that follows traditional single family accommodation (but is not limited to families), with the associated activities that goes with that usage, as distinct from other uses, such as commercial. The court also considered whether a zoning by-law could regulate short term land use, as Tourist Homes were defined by reference to occupancy of less than 28 days. Again, applying a purposive approach, the court considered the legislative scheme and found that the use of dwellings for short term accommodation is different than a longer term family use from the point of view of the use of community facilities, amenities, etc. As a result, the by-law was upheld.

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[5] 2006 CarswellBC 91, 2006 BCCA 28.
[6] 1997 CarswellOnt 5666, 36 OMBR 124.
[7] 2000 CarswellAlta 1066, 273 AR 63.

In the 2001 British Columbia Supreme Court case of *Whistler (Resort Municipality) v. Miller*[8], the plaintiff sought a declaration that the defendants were using land for a temporary commercial accommodation by providing rental accommodation contrary to a by-law which restricted the use to single family residential use. The defendants pled as a defense to the claims that the by-law regulated the users of a detached dwelling, not the use of the land and therefore the by-law was *ultra vires*. This argument was rejected by the court, which found that the by-law clearly was intended to, and did regulate, the use of the land not the persons who used it.

The 2003 decision of *Whistler (Resort Municipality) v. Wright*[9] saw the plaintiff municipality seeking an interlocutory injunction restraining the defendants from renting properties as short-term accommodations to tourists or other residents, alleging that such use was contrary to a zoning by-law which precluded occupancy in these areas to all but family residential uses. The defendants contended that the zoning by-law attempted to regulate on the basis of residence, ownership or tenancy rather than on land use. Following the decision of *Whistler (Resort Municipality) v. Miller*, the court dismissed this argument stating that the zoning by-law draws no distinctions with regard to ownership or tenure but rather fixed residential accommodation as opposed to temporary accommodation, which is a distinction based upon land use, not a distinction based on people using the land.

Most recently, the Ontario Municipal Board decision of *Rosen, Re*[10] considered permissions and prohibitions relating to short term rentals of non-owner occupied residences in the Town of The Blue Mountains (the "Town"), a popular resort destination near Collingwood, Ontario. In this case, the defendant operated and managed 80 rental properties in the area. The Town passed an interim control by-law to prohibit the use of any land, building or structure for the purpose of short term accommodation. A short term accommodation was defined as one that operates or "offers three or more bedrooms as a place of temporary residence... for a period of 30 consecutive calendar days or less..." The appellant argued that the by-law attempted to regulate the user of accommodation, not the use of the land and that the zoning by-law discriminated on the basis of income as well as place of origin, inconsistent with both the Ontario *Human Rights Code* (the "*Code*") and the *Charter*. The Board confirmed that its decisions must be in accordance with the *Code* and the *Charter*, but in its reasons stated that several cases and many statutes distinguish between transient living and permanent accommodation and that the municipality acted legitimately and within its authority in distinguishing between short term accommodations and permanent dwellings. The Board held that the proposed zoning by-law did not constitute people zoning, as it is intended to regulate the use of the lands and was a "legitimate exercise of [the municipality's] authority to zone for "differing levels of use intensity and differing needs for municipal services".

The courts most recently considered the issue of what it means to be a "single housekeeping establishment" in the case of *Neighbourhoods of Windfields Limited Partnership* v. *Death*.[11] The case was brought against homeowners in an area of Oshawa referred to as the

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[8] 2001 CarswellBC 80, 2001 BCSC 100; leave to appeal dismissed 2002 CarswellBC 1558.
[9] 2003 CarswellBC 1907, 2003 BCSC 1192.
[10] 2011 CarswellOnt 5300.
[11] 2008 CarswellOnt 5025, 48 M.P.L.R. (4th) 183; aff'd 2009 CarswellOnt 1756; leave to appeal to the Supreme Court of Canada dismissed [2009] S.C.C.A. No. 253 (S.C.C.).

Neighbourhoods of Windfields Farm (the "Neighbourhoods"), which is located in close proximity to both Durham College and the University of Ontario Institute of Technology. The houses had all been rented to students of these institutions. The City and the developer of the subdivision brought an application for a declaration that the houses were being used in contravention of the zoning by-law, as they were not being used as units "designed for use as a single housekeeping establishment", a term not defined in the by-law. In preparation for the court application, fixed video cameras were mounted, and mobile surveillance was used, to record the behaviour of students in the Neighbourhoods. In addition, evidence was produced that alterations had been made by the owners to add additional bedrooms and/or bathrooms. All of the homes contained only one kitchen and shared living areas. Evidence as to lease arrangements, type of home insurance, etc., was also relied upon.

The court held that the proper approach to interpreting a zoning by-law is one that takes into account the words used, the intent of council, and the purpose and scheme of the by-law as a whole. The court emphasized that legislative intent and purpose must inform the interpretation of the provision in question. In considering the by-law as a whole, the court held that the scheme of the by-law was to regulate use intensity through gradations of residential zoning. The court considered the other provisions of the zoning by-law, such as required parking, and density calculations to inform it's view that a single housekeeping establishment "would generally approximate a typical family group of one or two adult persons, together with minor or adult children or a similar social unit either by relationship or some other common bond for living together as a housekeeping establishment, not simply the need by boarders for temporary sleeping quarters for which each pays rent to the landlord/landlady." The court considered prior case law respecting "people zoning" as well as the Ontario *Planning Act*, which explicitly prohibits zoning by-laws from "distinguishing persons who are related and persons who are unrelated in respect of the occupancy or use of a building",[12] and held that a by-law will be appropriate where it recognizes most types of arrangements usual for people living together as a single housekeeping unit. The court held that a single housekeeping establishment "could include a group of unrelated persons, one or more of whom are dependent on the others due to physical or related challenges; or to one person; or a couple cohabiting with children (not theirs biologically), to whom they stand in loco parentis." The Ontario Court of Appeal held in dismissing the appeal, that while the lower court essentially found that there was no relationship between the renters other than their use and occupation of single rooms rented for short-term accommodation, that the *Planning Act* prohibition did not prevent the court from considering as a relevant factor how the renters related amongst themselves when determining whether they constituted a "single family establishment". Leave to appeal to the Supreme Court of Canada was dismissed.

While this case seemingly broadened the ability of municipalities to consider the relationship between occupants in enforcing their by-laws, although arguably not in passing such by-laws, it continues to raise concerns as to how by-law enforcement officers or zoning examiners will evaluate the "relationship" between the occupants to determine whether the zoning by-law is being complied with.

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[12] R.S.O. 1990, c. P.13, s. 35(2).

Human Rights and *Charter* Considerations in Zoning

While the *Code* and the *Charter* were not argued in the *Windfields* case, the Ontario Human Rights Commission (the "Commission") sought intervener status upon the application for leave to appeal to the Supreme Court of Canada. The Commission argued that the case had at its core issues for access to housing, and that the effect of the decision was to limit housing choices for students. While leave to appeal was not granted, and therefore the Commission's application to intervene dismissed, the Commission continues to monitor zoning by-laws across Ontario, warning that zoning definitions that restrict occupants of housing can have the effect of discriminating against *Code* protected groups.

The Manitoba Court of Appeal considered the application of the *Charter* to a by-law requiring a group home to apply for permission to form and live together as a group or family in the case of *Alcoholism Foundation of Manitoba* v. *City of Winnipeg*.[13] In this case, the City of Winnipeg enacted a zoning by-law that regulated group homes for the physically or mentally handicapped, the aged, victims of alcohol or drug abuse, and penal inmates. Such groups were required to apply to the City for permission to live together. While the by-law was considered to be consistent with provincial legislation and the municipal zoning power, it was found to be contrary to s.15 of the *Charter*. The court held that while municipalities have the right to protect "the neighbourhood integrity of its various districts, be they commercial, manufacturing, retail or residential areas", the by-law was an unjustified, differential treatment of disadvantaged people or groups of people. In particular, the court held that the City had failed to present any evidence that could be relied upon to justify the infringement under s. 1 of the *Charter*. As a result, the court held that the by-law amounts to "people" zoning, which is objectionable and discriminatory.

The British Columbia Supreme Court heard a *Charter* challenge to a zoning by-law regulating the use of secondary suites in single family residential areas in *Tenants' Rights Action Coalition* v. *Delta (Corporation).*[14] The zoning by-law prohibited such secondary suites unless the persons occupying the suites were related to the owner of the property. The by-law was challenged on several grounds, including unauthorized discrimination in the municipal (non-*Charter*) sense, as well as being contrary to the *Charter*. In considering the prior case of *Faminow* v. *North Vancouver*, the court held that "a determination that distinctions between people in housing choices based on family status does not constitute discrimination is a determination without regard to subsequent development in Human Rights legislation in Canada. It not only predates the *Charter*, it predates the B.C. Human Rights Code…Thus, today it is unlikely that zoning based on restricting occupancy of a dwelling based on family status could simply be declared not to be discriminatory." As the by-law was held to be invalid as being *ultra vires*, however, the court declined to rule on the *Charter* arguments.

In *Congrégation des témoins de Jéhovah de St.Jérôme-Lafontaine* v. *Lafontaine (Village),*[15] the Supreme Court of Canada considered whether the municipality's decision not to amend its zoning by-law to allow a religious group to build a place of worship on land it purchased

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[13] (1990), 69 DLR (4th) 697.
[14] (1997) 151 D.L.R. (4th) 729 (B.C.C.A.).
[15] [2004] 2 S.C.R. 650.

infringed the right to freedom of religion guaranteed by the *Charter*. In this case, Jehovah's Witnesses had been looking for a parcel of land to establish a place of worship. As they had been unable to find land within a zone which permitted a place of worship, they acquired land within a residential zone and sought a zoning by-law amendment. The application was refused. They then purchased another lot in a commercial zone and twice applied for a zoning by-law amendment. Again, the applications were refused. The majority of the court focused on a municipality's duty of procedural fairness, and held that this duty had been breached, sending the application back to the municipality for reconsideration. As a result, the majority did not consider the constitutional questions. However, the dissenting judges did consider the application of the *Charter* to the zoning by-law. While they agreed that a violation of the *Charter* had not been established in this case, the reasons provide some guidance as to the application of the *Charter* to zoning by-laws. The judges reasoned that a municipality is required to be neutral in matters of religion, and its by-laws must be structured in such a way as to avoid placing unnecessary obstacles in the way of the exercise of religious freedoms. However, a municipality does not have to provide assistance of any kind, as this would be incompatible with the duty of neutrality. The dissenting judgment went on to consider the hypothetical situation in which there was no land available in the zone that permitted a place of worship. The dissent reasoned that in such a situation, the municipality's refusal to amend the zoning by-law would constitute an infringement of the group's freedom of religion. The infringement would not result from the existence of the zoning by-law, but from "the refusal to adapt it to evolving community needs in a situation in which no land was available in the zone set aside for the establishment of places of worship." What is most surprising about this analysis, is the lack of discussion of land use planning issues.

In Ontario, the Ontario Municipal Board first considered the application of the *Code* and *Charter* to its decisions in *Unger* v. *Onondaga (Township)*.[16] In this case, the Board was asked to consider a site-specific amendment to the official plan of the Township to permit the subdivision of agricultural lands into four residential lots for the proponents' family. The Board held that, in all its functions, the Board must act in accordance with the *Charter* and has the jurisdiction, and "the positive duty", to deal with *Charter* issues as they are raised within its proceedings.

If any question remained as to the jurisdiction of tribunals to consider human rights issues, they were settled by the Supreme Court of Canada in *Tranchemontagne* v. *Ontario*.[17] In this case, the court considered the jurisdiction of the Social Benefits Tribunal to consider the application of the Human Rights Code. The Supreme Court of Canada held that "the Code is fundamental law. The Ontario legislature affirmed the primacy of the Code in the law itself, as applicable both to private citizens and public bodies. Further, the application of Code issues is no longer confined to the exclusive domain of the intervener the Ontario Human Rights Commission… It is settled law that statutory tribunals empowered to decide questions of law are presumed to have the power to look beyond their enabling statutes in order to apply the whole law to a matter properly in front of them."

[16] [1997] O.M.B.D. No. 17.
[17] [2006] 1 S.C.R. 513.

In *Kitchener (City) Official Plan Amendment No. 58,*[18] the Ontario Municipal Board issued an interim decision concerning an appeal against an official plan amendment and zoning by-law amendment enacted by the City of Kitchener concerning its Cedar Hill area. It was estimated that almost 20% of Cedar Hill's residents are persons with disabilities or persons in receipt of public assistance. The City was concerned about the area's over-concentration of single person, low income households and residential care facilities and social/supportive housing and sought to decentralize these facilities and encourage a greater neighbourhood mix. In an interim decision, the Board held that before the City could enact restrictive measures in its official plan and zoning by-law that would restrict housing for persons with disabilities and/or in receipt of public assistance, it will need to supply the relevant planning analysis, including consideration of "people zoning" and *Code/Charter* dimensions, "commensurate with the thrust of the measures which today's municipal authorities wish to pursue". In considering the issue of people zoning, the Board emphasized that *Bell* was not confined to consideration of "relationships", but to all "personal qualification of this type or other personal characteristics or qualities". While the Board held that it was not satisfied that there was sufficient assessment or rationale to demonstrate that being in a "single-person, low-income household", being the characteristics targeted by the enactments, was not "people zoning", it gave the City and Region more time to address this issue.

In considering the *Code* and the *Charter*, the Board considered the purpose of the amendments to limit the number of neighbourhood residents who were in certain identifiable groups. The City did not deny that these were identifiable groups mentioned in the *Code* and the *Charter*. The Board held that the *Code* would appear to prohibit a by-law or planning instrument that had a discriminatory effect, subject to the defence of "reasonableness and bona fide under the circumstances". The Board went on to state that, while it did not make the determination in this case, "a municipality which sought to justify the imposition of a discriminatory standard/requirement/policy might be expected to establish that it made real and meaningful efforts to accommodate the needs of persons adversely affected by the standard/requirement/policy, or sought less discriminatory approaches to achieving the objective. It might also be expected to establish, on a substantive level, that it is not possible to accommodate, short of undue hardship."

Lessons Learned

While the courts across Canada have approached the concept of "people zoning" inconsistently, it is clear that any consideration of a zoning by-law that impacts particular groups in a community will need to address the applicable Human Rights Code and the *Charter*. As a result, what can be gleaned from the case law is that any municipality considering the enactment of such a by-law should consider its provisions from three separate, although related, perspectives: is the zoning regulation being passed for a proper planning purpose, taking into consideration the purpose of zoning by-laws to prevent nuisances, and to address planning concerns such as density, servicing, parking, etc; if the by-law may impact certain Human Rights Code protected groups, is the by-law reasonable and bona fide in the circumstances; and if the by-law may infringe a right guaranteed by the *Charter*, has there been sufficient analysis to support the infringement under s. 1 of the *Charter*. While the treatment by the courts may be less

[18] [2010] O.M.B.D. No. 666.

predictable, in this way municipalities can ensure that they have an adequate evidentiary basis to support its zoning by-laws in the event of challenge.